No. 10945

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES GOODWIN POWELL and ANNA STRACHAN POWELL, Husband and Wife,

Appellants,

vs.

PETER J. WUMKES,

Appellee.

APPELLEE'S BRIEF.

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Preliminary Statement.

This is the second appeal by the bankrupts from an order of the District Court reversing two separate decisions by a Conciliation-Commissioner-Referee, giving the bankrupts the right to obtain the subject property at a price grossly disproportionate to its actual value. (*Powell v. Wumkes*, 142 Fed. (2d) 4.)

Although the schedules have not been included in the transcript of the present appeal, they constitute a portion of the record of the Bankruptcy Court, were considered by the court below, and are in the records of this court in the matter of the previous appeal. (Ninth Circuit No. 10610.) These schedules show that the bankrupts purchased the property which the Commissioner-Referee attempted to transfer to the bankrupts by payment of $5,575.00 [Tr. p. 29] in 1938, for the sum of $13,500.00;

$2500.00 being paid in cash, and the balance of $11,000.00 being secured by a purchase money note and deed of trust on said property. Within two years, in July, 1940, the bankrupts filed a debtors' petition under Section 75 of the Bankruptcy Act, stating under oath that the real property had a value of $8,000.00. In December, 1942, the debtors petitioned for a re-appraisal under the provisions of Section 75, Subdivision S(3), and at that time the Commissioner-Referee fixed the value of the property at $3,900.00, which determination was promptly set aside by the District Court on review, Honorable Leon Yankwich, Judge Presiding, such action being affirmed on appeal by this court. (*Powell v. Wumkes, supra.*)

Upon a re-trial of the issues, without any testimony from the bankrupts (Appellants herein), and largely upon the investigation made by certain individuals prior to March of 1943, the Commissioner-Referee fixed the value at $5,575.00, which was again promptly set aside by the District Court, Honorable Paul McCormick, Judge Presiding, and which action of the District Court is the subject matter of this appeal. The review, which resulted in the determination appealed from herein, was made upon a transcript of the testimony taken before the Commissioner-Referee, his findings and order [Tr. p. 21], the schedules of the debtors (now bankrupts), the claim of Peter J. Wumkes (Appellee herein)* and additional af-

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*The schedules of the bankrupts and the approved claim of the secured creditor are a part of the bankruptcy court's file, and were before the lower court; the arguments below referred to the facts herein recited. Such documents are not included in this transcript, but the schedules and the amount of the approved claim are included in the transcript of appeal No. 10610, a portion of this Court's records. We request Appellants to concede the correctness of the facts, and in the absence of such concession will move to augment the record by these documents.

fidavits by two persons engaged in the orange packing business, Donald D. Wyllie, a resident of Redlands Citrus District for the past twenty years, and L. A. Turner, engaged in the business of growing, packing and shipping citrus fruits, and a co-owner of approximately 500 acres of citrus properties in the district, who declared the property to have a value of $13,000.00 and $12,500.00, respectively.

During the course of the presentation of the review before the District Court, a question arose as to whether rentals fixed by the Commissioner had been paid, and it was then stipulated that no monies, pursuant to such rental order made by the Commissioner-Referee, had been paid to or received by the secured creditor from the inception of the proceedings. [Tr. p. 47.]

Although the bankrupts objected to the introduction of the affidavits of Messrs. Wyllie and Turner [Tr. p. 41], the nature or grounds of the objections were not stated in the District Court, and are not stated in Appellants' Brief, except, apparently, as the affidavit of Mr. Turner included an offer to purchase for $9,000.00 cash, with a view of making a quick profit. [Tr. p. 38.]

Both the Commissioner-Referee and the bankrupts appear to ignore the crop on the trees which was estimated to be worth between $5,000.00 and $5,500.00, by the witnesses appearing for the creditor [Tr. p. 37], and admitted by the debtors' chief witness, to have a value of at least $3,000.00. [Tr. p. 73.]

Appellee's Points and Arguments in Support of District Court's Determination.

(A) The District Court, on Review of the Commissioner-Referee's Order of June 21, 1944, Correctly Permitted the Introduction of Additional Testimony, and Based Upon Such Enlarged Record, Correctly Exercised Its Discretion in Reversing the Commissioner-Referee's Decision.

It is, of course, elementary that the fundamental and primary responsibility for a decision made in any proceeding in the Federal Court is that of the District Court.

The Bankruptcy Act places the responsibility for the accurate, fair and impartial administration of the Bankruptcy Act upon the District Courts sitting in bankruptcy.

> "(a) The Courts of the United States hereinbefore defined as Courts of Bankruptcy * * * are hereby invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Title * * * to * * * (10) consider records, findings, and orders certified to the judges by referees and confirm, modify or reverse such findings and orders or return such records with instructions for further proceedings; (15) make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Title * * *.
>
> "(b) Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." (11 U. S. C. A., Sec. 11, Chapter 2, Courts of Bankruptcy.)
>
> *In re Albert,* 122 Fed. (2d) 393.

A Bankruptcy Court is a court of equity and is guided by equitable doctrines and principles.

Pfister v. Northern Illinois Finance Corp., 63 Sup. Ct. 133; 317 U. S. 144; 87 L. Ed. 146;

American United Mutual Life Insurance Co. v. City of Avon Park, 61 Sup. Ct. 157; 311 U. S. 138; 85 L. Ed. 91.

The District Court, in the exercise of a sound discretion, can, in a proper case, take additional evidence if it deems such evidence necessary to prevent a miscarriage of justice, and based on such evidence, and also the evidence contained in the certificate on review, may correct, modify or reverse the order of the Commissioner or Referee.

Equity Life Assurance Society of U. S. v. Carmody, 131 Fed. (2d) 318;

Rait v. Federal Land Bank, 135 Fed. (2d) 447;

Dunsdon v. Federal Land Bank, 137 Fed. (2d) 84;

Kauk v. Anderson, 137 Fed. (2d) 331;

Rhodes v. Federal Land Bank, 140 Fed. (2d) 612.

In *Kauk v. Anderson*, *supra*, the Circuit Court of the Eighth Circuit, states the functions of the District Judge on Review of a determination by the Referee as follows:

> "* * * The function of the district judge, in reviewing the determination of the conciliation commissioner, is to ascertain (1) whether a fair hearing was accorded, (2) whether all competent evidence

offered was received and considered, (3) whether any incompetent evidence was received and relied upon. (4) whether there was substantial competent evidence to support the determination, and (5) whether it is contrary to the clear weight of all of the competent evidence adduced. * * *"

"* * * The record on review may afford a sound and sufficient basis for a determination of value by the district judge and therefore justify a modification of the commissioner's valuation. Unless the record does furnish such a basis, we think that the proper course for the district judge to pursue is either to take additional evidence and then determine the issue from the evidence as supplemented or to remand the case to the commissioner with directions to retry the issue of value, pointing out to him the errors which invalidated his previous determination. * * *"

With respect to the duties of the District Judge in determining a petition for review from an order made by a referee, it has been repeatedly and consistently held that such duties of the District Court embrace large supervisory powers and are greater than the duties of an Appellate Court: the District Court must assume the responsibility for the litigants having had a fair and impartial determination of their controversy, based upon the entire record and such other evidence as the District Court may have permitted, the Appellate Court is only charged with the duty of ascertaining whether reversible error has been committed. (Rule No. 52 (a) of the Rules of Civil Procedure, 28 U. S. C. A., following Section 723 (c).)

In a footnote in the case of *Rhodes v. Federal Land Bank of St. Paul, supra*, the Eighth Circuit Court of Appeals has correctly set out the function of the District Court at page 613:

> "Our previous decisions point out that, unless there has been some error in the conciliation commissioner's processes, the district judge may not simply try the question of value de novo on the record, but that he does have the right, if the record suggests that a gross miscarriage of justice probably has occurred, to test the situation by receiving additional evidence, and, in the new legal situation thus created, to make such disposition of the matter as the entire evidence before him appears soundly to demand. Dunsdon v. Federal Land Bank of St. Paul, 8 Cir., 137 F. 2d 84, 86, 87; Kauk v. Anderson, 8 Cir., 137 F. 2d 331, 334."

Likewise, the Ninth Circuit Court has cited with approval the Eighth Circuit's decision on this rule and has expressed itself, as follows:

> "But unlike the Appellate Court, the judge is empowered in appropriate circumstances, to receive further evidence; and on the basis of the enlarged record he may modify or make findings, or may re-commit the matter for further hearing by the Referee * * * the judge must be conceded a reasonable measure of discretion, and we think it enough to say that his discretion was not abused in this instance. Powell v. Wumkes, 142 F. 2d 4-6."

(B) The Record Is Replete With Errors Committed by Commissioner-Referee Which Indicated That a Miscarriage of Justice Had Occurred.

The following excerpts from the testimony show the errors committed by the Commissioner-Referee, and also the fact that certain of the witnesses were not entitled to have their testimony considered of any value, and also that as to certain of said witnesses, the necessary factors to determine present market value were omitted.

The witness, Charles Aubrey, was apparently testifying from an examination of the property in 1943:

> "Q. Did you examine the soil on that particular grove? A. I examined the soil back in January, 1943. I dug some holes in the soil.
>
> Q. That was prior to your former testimony in this Court? A. Yes." [Tr. p. 53.]

> "Q. What is your conclusion? A. Well, I think it is worth $5200 with the crop. As of January 28th, 1943, I estimated it at $3900 and I think the actual increase in value will amount to a third higher than it was at that time. * * *" [Tr. p. 56.]

Likewise, this witness' appraisal ignored the crop on the trees:

> "Q. Would that appraisal be affected in any way by the crop that was on the trees? A. I don't think it would. * * *" [Tr. p. 58.]

The present crop and its present value were immaterial to this witness:

> "Q. The price of $5200, or the valuation of $5200 that you place on this property did not in any way

consider the crop that was on the trees? A. Only an average crop is the only way I would consider it over a period of at least 10 years." [Tr. p. 59.]

The witness was unwilling to consider the proper factors in determining market value and his opinion would not be changed by any known offers to purchase the property:

"Q. Would it affect your appraisal and your fixing a reasonable value if you knew an offer of $10,000 was made for the property? A. Not a bit in the world, on this market. I would not be at all surprised to hear of that being offered, but that is no sign I think it is worth it." [Tr. p. 62.]

"Q. So, to sum up your testimony, if I understand it correctly, the fact that there may have been cash offers for the property considerably in excess of the amount that you have fixed as a reasonable value of this property, that still would not change your estimate of the reasonable or market value of the property?

(Objection and ruling.)

A. I think I know exactly what I said. It would have no bearing upon my judgment." [Tr. p. 63.]

The witness, J. W. Mehl, was likewise unwilling to take into consideration those factors which normally comprise the basis of market value:

"Q. If there was a ready buyer for this property for $10,000 cash would that affect your appraisal, if you knew that that offer was being made? A. * * * No." [Tr. p. 69.]

"Q. In appraising this property did you inquire as to whether there had been any sales in that locality? A. I did not." [Tr. p. 70.]

The Commissioner-Referee improperly sustained objections to questions put to this witness on cross-examination.

> "Q. Assuming that the fruit on this—the packing house net returns on this property brought in the neighborhood of $5,000 this year, that is, the 1943-1944 season, would that affect your appraisal?
>
> * * * * * * * * *
>
> (Objection.)
>
> Mr. Duffy: I think that will have to be sustained." [Tr. pp. 71-72.]

Although the production costs for growing, spraying, etc., taxes and even the bankrupts' attorneys' fees, had already been paid (Appellee claims illegally and erroneously from the share of the crop set aside as rental), the Commissioner-Referee accepted the testimony of J. W. Mehl as controlling, when such testimony *conclusively* shows that his estimate was reduced in order to provide for the cultural costs:

> "By Mr. Duffy: Q. What is the figure now that this court has got to deal with? A. I have given $4450 without the crop; an estimated crop of $3,000, but a net to the grower of $1125.
>
> Mr. Duffy: Then your value of the property—A. Without the crop would be $4450.
>
> Mr. Duffy: And $1125 for the crop? A. Yes, net to the grower, that is $5575.
>
> By Mr. Nichols: Q. How did you arrive at that net figure that you give? A. I get that from packing house men, that it should bring net to the grower 75 cents a field box.
>
> Q. I assume you have based that figure on a ceiling price on Valencias? A. That is right.

Q. And that is $2.00, is it? A. Yes, 4 cents a pound, I think it is.

Q. Do you know what size box the packing house has? A. 50 pounds a box.

Q. What would that ceiling be? A. $2.00 for a field box, so I understand.

Q. Then you figure it costs the grower $1.25 per box to raise that fruit? A. That is right.

Q. On a basis of obtaining a ceiling then, a deduction of $1.25 per field box for growing that would leave 75 cents net to the grower? A. Right.

Mr. Nichols. That is all.

Mr. Griffin: That is all* [Tr. p. 73.]

The witness, W. H. Johnson, based most of his testimony on investigation made by him previous to March of 1943:

"Mr. Duffy: Debtor's Exhibit 4 admitted in evidence at the last hearing on this proceeding, to wit, on the 3rd day of March, 1943, and now being filed in the office of the Clerk of the United States District Court, Southern District of California, Central Division, is now admitted as an exhibit in this hearing as 'Debtor's Exhibit 4.'

Mr. Nichols: I have no objection to its being admitted in this hearing with the understanding that it is admitted as a chart which was made on the day that Mr. Johnson will testify that it was made.

Mr. Griffin: No objection to that.

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*The certificate on review of the Commissioner-referee states that he is submitting a "copy of report furnished petitioning creditor and attorney for petitioner creditor dated November 3, 1943." This report has been omitted from the transcript.

By Mr. Griffiin: Q. Since the time that you made this plat, have you been upon the property? A. Yes, sir.

Q. Do you know whether there have been any changes made on the property that you have not indicated on the plat? A. Not that I know of. Possibly a few new trees may have been put it. I did not check that definitely. * * *." [Tr. pp. 75 to 77.]

"Q. Now, did you take some pictures out there of the grove? A. Yes, sir.

Q. These pictures that you took are the ones that were taken for the former hearing? A. Yes, just a few days before the former hearing.

Q. And that was approximately a year ago? A. Yes, a little over a year ago." [Tr. p. 79.]

The Commissioner-Referee erroneously overruled the creditor's objections to the photographs:

"By Mr. Griffin: Q. I show you another picture and ask you what that purports to be? A. That is another picture in the rear of this same orchard.

Q. And when was that taken? A. I think it was taken in February, 1943.

Q. And it was taken for the purpose of showing the size of the fruit? A. The size of the fruit and it was a 14 foot pole there. * * *

Mr. Griffiin: I offer that in evidence.

Mr. Nichols: Object to it.

Mr. Duffy: Overruled. Admitted as Debtor's Exhibit 8." [Tr. p. 82.]

"Mr. Nichols: I want my objection to show the grounds that no foundation has been laid, and that

the pictures were taken too long ago to correctly represent what the present condition of the property is.

Mr. Duffy: The same ruling. * * *" [Tr. p. 84.]

Likewise, his opinion was based on sales made a year previously:

"Q. And that was sold more than a year ago? A. Just about a year ago, I think. Well, it was not sold at the time we had this hearing here. * * *" [Tr. p. 89.]

"Q. How long ago was that sale made to your knowledge? A. Oh, I should judge something like a year ago; I don't remember exactly." [Tr. p. 90.]

At the time of his testimony he did not know of any citrus property in the general locality available for purchase at $1,000.00 per acre:

"Q. Do you know of any citrus property in this general locality available for the purchase for a thousand dollars an acre? A. No, I don't." [Tr. p. 89.]

In that respect, it may not be amiss to call the court's attention to the fact that all of the reported cases consider the value that is the subject matter of inquiry under Section 75, Subdivision S(3), to be the *present* value, one that exists at the time of the hearing.

The *Rhodes v. Federal Land Bank* case, *supra*, referring to this subsection, refers to "the *present* fair and reasonable market value." (Emphasis added.)

The case of *Carter v. Kubler,* 320 U. S. 243, 88 L. Ed. 27, in a decision based upon the same subsection, refers

to "the *present* fair value of such farm." (Emphasis added.)

The witness, J. H. Nicholson, placed his estimate of $6,000.00 on his personal willingness to purchase it at that price.

> "Q. So the value you place on it would be the price on which you would be willing to purchase it? A. Yes, sir.
>
> Q. And that is the sole basis for your fixing the market value at that figure of $6,000? A. Yes, sir." [Tr. p. 99.]

The Commissioner-Referee erroneously sustained an objection to a question bearing on the qualifications of the witness, Fred Brock, and the basis upon which he formed his opinion:

> "By Mr. Nichols: Q. What, if any, sales are you familiar with?
>
> Mr. Griffin: Objected to as incompetent, irrelevant and immaterial.
>
> The Court: Sustained." [Tr. p. 109.]

The Commissioner-Referee erroneously refused to consider a *bona fide* offer to purchase by the witness, K. C. O'Bryan:

> "Q. What, in your opinion, is the reasonable market value of that property? A. I think it is worth $12,500. However, I come over here prepared to make an offer of $10,000 for it, all cash.
>
> Mr. Griffin: I move to strike the last part of the statement out as incompetent, irrelevant and immaterial.
>
> Mr. Duffy: The last part may be stricken out." [Tr. p. 119.]

* * * * * * * *

"Q. So that your valuation without the crop at this time is $9,000? A. Yes, but I am willing to pay $10,000 with the crop.

Mr. Duffy: Mr. Witness, you will not volunteer any more information. Let the last part of the answer be stricken out.

* * * * * * * *

Q. By Mr. Nichols: At this time I would like to offer proof by a cash offer and I will tender proof of a cash offer in the amount of $10,000 for this property and tender herewith cash in the amount of $50. and a certified check in the amount of $950, being ten percent of the amount of the offer. I am handing that over to you at this time, Mr. Duffy.

Mr. Duffy: I cannot accept anything of that kind.

Mr. Griffin: Objected to as incompetent, irrelevant and immaterial.

Mr. Duffy: The objection is sustained. Now, this money is not under my jurisdiction so you better get it away from here as I am not responsible.

Mr. Nichols: If you are refusing to entertain the offer in any way—

Mr. Duffy: I have sustained the objection to the offer." [Tr. p. 120.]

While it may be argued that testimony by an owner of offers made to him is subject to the objections stated in *Sharp v. United States,* 191 U. S. 341, 48 L. Ed. 211, that case does not hold that the offeror himself cannot testify, as the honesty of his offer, his ability to purchase, his capability of forming a fair and intelligent judgment, and his desire, are all available subjects of cross-examina-

tion. The testimony is at wide variance with the facts in the foregoing case, and the Supreme Court recognizes this distinction by stating, following a recital of the difficulties that beset testimony by an owner concerning offers made to him:

> "* * * Especially is this the case when the offers are proved only by the party to whom they are alleged to have been made, and not by the party making them. * * *"

(C) The Record Indicated That the Commissioner-Referee May Have Departed From His Duty to Conduct the Hearing With Fairness and Impartiality, and by Reason of Such Departure, a Miscarriage of Justice Had Occurred.

(1) The excerpts from the testimony presented herein, while in some instances not conclusive as to error committed by the Commissioner-Referee, nevertheless exemplify a bias and lack of impartiality to well move the District Court to refuse confirmation of the Commissioner-Referee's decision, and to return the record with instructions for further proceedings.

(2) In the decision made by the Commissioner-Referee dated May 26, 1944, the Commissioner indulges in the following speculative conclusion:

> "Another question.
>
> Q. Would you be willing to take this property and cancel the indebtedness that you hold against it? (Objected to and sustained.)
>
> It is not difficult to conclude what the answer of witness would have been had he been allowed to answer. It is obvious from the testimony quoted, that this witness, Peter J. Wumkes, creditor and holder

of encumbrance on the property in question, is desirous of regaining possession of said property." [Tr. pp. 15-16.]

(3) Without any evidence whatever, and without even the suggestion of an inference therefor, the Commissioner-Referee finds that the offer to purchase made by one of the witnesses for the creditor, K. C. O'Bryan, was based upon pure speculation and lacked the element of good faith. [Tr. p. 26.]

We do not know what prompted the Commissioner-Referee in reciting the qualifications of the two Inheritance Tax Appraisers appearing as witnesses in the case to say that the one appearing for the debtors had "considerable" appraising experience, and the one appearing for the creditor having only "some" appraising experience. [Tr. p. 13.] Neither can we state with definiteness what motivated the Commissioner-Referee in first sustaining an objection to a question and then concluding what the answer was going to be, as shown above. But the District Court, in the exercise of a sound discretion, found "that the Commissioner-Referee prejudicially erred in failing to consider evidence of other sales of comparable property" [Tr. p. 40], and branded the value fixed by the Commissioner-Referee as "unfair." [Tr. p. 41.]

It seems obvious from a reading of the Commissioner-Referee's decision, his findings of fact, and the transcript that the charge made by the District Court was justified, and its discretion was properly and correctly exercised on the showing that a "fair" hearing was not accorded to the Appellee.

Conclusion.

In conclusion we direct the court's attention to the fact that the Appellants' Brief presents no justifiable reason to reverse the judgment of the District Court. The Appellants confine their attack to one portion of the record alone. They do not dispute the fundamental principles which we have shown herein, nor the correctness of their application to the record made in the court below.

The discretion exercised by the District Court in rejecting the decision of the Commissioner-Referee was used in the interests of justice, and it appears that no charge of abuse of such discretion can properly be urged. The determination of the former Commissioner-Referee, the method used in arriving at his conclusion, and the obvious lack of judicial impartiality in conducting the hearing and making his decision, lead to the inevitable conclusion that the District Court acted to prevent a miscarriage of justice.

We respectfully submit that the determination of the District Court is correct when the principles of either law or equity are applied to test the soundness of its judgment and that therefore the order appealed from should be affirmed.

Respectfully submitted,

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